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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-334

NO. 1970

DU PAGE UTILITY COMPANY,

Petitioner,

vs.

ILLINOIS COMMERCE COMMISSION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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NO. 1880

DU PAGE UTILITY COMPANY,

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

The only substantial question presented by the instant petition is whether or not the decisions below holding that contributions in aid of construction should be deducted when determining a utility's rate base are contrary to law in that they fail to provide just compensation, in violation of the Fourteenth Amendment of the United States Constitution and the case law relative thereto.

STATEMENT OF THE CASE

Petitioner's statement of the case is misleading or erroneous in the following material respects:

Although Du Page Utility Company's ("Du Page") books may have reflected a net operating loss for the test year, it should be noted that applying the Illinois Commerce Commission's ("Commission") adjustments to operating expenses (particularly the disallowance of a portion of the officer's salaries which it determined to be excessive and the Federal Income Tax thereon) its books reflect a net profit for the same year. Furthermore, whereas the Commission disallowed the *proposed* rate increase, its order did authorize a rate increase which provided Du Page with an increase in annual revenue of $13,729.00. Petitioner has applied illusory machinations to the figures in the record thereby calculating an allowed return of 0.136% or 0.121% when in fact the Commission's order expressly and clearly specifies a rate of return of 6.5%. (Order on Rehearing, P. 20, R/Unit II, Vol. I, Sec. 26.)

Petitioner, in misstating the issue before this Court, asserts that the Commission eliminated or disregarded net original cost or net reproduction cost new. The Order on Rehearing clearly evidences the Commission's thorough consideration of both elements.

Most significantly, Petitioner makes the claim that ". . . the Commission reclassified $793,195.25, representing cash donations to capital by affiliated interests of shareholders of Du Page, from capital surplus to 'contributions in aid of construction' . . ." (Petition p. 5). The fact is that the sums referred to were recorded and carried by Du Page on its own books as "contributions in aid of construction" until December of 1966, approximate-

ly seven weeks prior to its application instituting the present proceedings, when Du Page, without commission approval, reclassified the funds as "capital in excess of Par Value of Shares." Furthermore, the record unequivocally establishes that Du Page failed to report any such funds as paid-in surplus on its annual corporate reports filed with the Illinois Secretary of State during the years 1962 through 1967, inclusive. Finally, Du Page's Federal Income Tax Return for the year 1966 reflects such funds as having a zero tax basis in accordance with Section 362 (c) of the Internal Revenue (26 U.S.C. § 362 (c)) which provides that property constructed with funds donated by persons other than shareholders shall have a zero tax basis. Thus, the record leaves no room for argument; it was Du Page, not the Commission which "reclassified" and in fact, misclassified the funds in question.

Petitioner's Statement of the Case ignores at least one other pertinent fact. The Meadows Community Association and the Oak View Homeowners Association ("Intervenors") representing approximately six hundred and twenty (620) homeowners in the area affected by the proposed rate increase, participated as Intervenors before the Commission and filed their separate appeals in both the Circuit Court of Du Page County and the Illinois Supreme Court. It is significant to note that the Intervenors' appellate stance has been that the Commission's Order on Rehearing was erroneous in that Du Page was not justified in receiving *any* rate increase. Thus the Intervenors contentions and supporting argument belie the capriciousness of the Petitioner's claim that the rates authorized are confiscatory.

REASONS FOR DENYING WRIT

The Decisions Below are Not Contrary to any Requirements of the Fourteenth Amendment or any Decisions of the United States Supreme Court or Other Controlling Authority.

The only real issue proffered by the instant Petition is whether or not the Commission's Order on Rehearing, in deducting contributions in aid of construction when determining fair value rate base, was contrary to law in that it failed to provide just compensation, in violation of the Fourteenth Amendment and the case law relative thereto. Thus the threshold issue concerns the propriety of deducting contributions in aid of construction when determining rate base. Far from novel, the rule prescribing such deductions is followed by regulatory Commissions across the country, with virtual unanimity, See: (Cal.) Re Southern California Gas Co. (1950) 87 PUR NS 492; (MD) Re County Comrs. of Washington County Case No. 5437, Order No. 52391, Sept. 6, 1956; (ARIZ) Re Tucson Gas, E. L. & Power Co. (1961) 40 PUR. 3d 453; (CONN) Re Stamford Water Co. (1962) 44 PUR 3d 308; (PA) Pennsylvania Pub. Utility Commission v. Pennsylvania Power Co. (1960) 33 PUR 3d 177; (MONT) Re Hungry Horse Water Co. (1948) 79 PUR NS 172; (WIS) Re La Crosse Teleph. Corp. 2-U-2613, June 19, 1948; (IND) Re Indiana Gas & Water Co. (1960) 35 PUR 3d 43; (N.M.) Re Western Gas Service Co. (1962) 45 PUR 3d 123; (MICH) Re Northern Power Co. (1932) PUR 1933C, 128; (N.Y.) Re Western New York Water Co., Case No. 8233, May 19, 1937; (OHIO) Re West Jefferson Power & Light Co., PUR 1933D, 163; (FLA) Re Azalea Park Utilities, Docket No.

8619-WS, Order No. 4361, May 20, 1968; (IOWA) Re Davenport Water Co. (1968) 76 PUR 3d 209; (IDAHO) Re Boise Water Corp. (1952) 95 PUR NS 43; (VT) Re Citizens Utilities Co. (1951) 90 PUR NS 46; (WASH) Re Public Service Commission v. Washington Water Power Co. (1953) 98 PUR NS 12; (ARK) Re Arkansas Louisiana Gas Co. (1955) 7 PUR 3d 561, 564; (KAN) Re Kansas City Suburban Water Co., Docket No. 44, 519-U, Nov. 18, 1953; (KY) Re Central Kentucky Nat. Gas Co., Case No. 2800, May 18, 1955; (MASS) Re Pittfield Coal Gas Co. (1954) 3 PUR 3d 1; (MO) Re Joplin Water Works Co. (1957) 20 PUR 3d 195; (N.J.) Re New Jersey Nat. Gas Co. (1954) 6 PUR 3d 249; (N.C.) Re Duke Power Co., Docket No. E-76, Sub 6, April 16, 1952; (N.D.) Re Montana-Dakota Utilities Co. of Minneapolis (1958) 22 PUR 3d 505; (R.I.) Re Narragansett Electric Co. (1957) 21 PUR 3d 113; (WYO) Re Cheyenne Light, Fuel & Power Co. (1955) 7 PUR 3d 129.

Furthermore, the state courts of the several jurisdictions which have been confronted with the issue have approved the rule, finding no confiscation in its application, again with virtual unanimity. See: *Westwood Lake* v. *Metropolitan Dade County Water & Sewer Board,* 203 So 2d 363; *United Gas Corp.* v. *Mississippi Pub. Service Commission* (1961) 38 PUR 3d 252, 127, So 2d 404; *City of Hagerstown* v. *Maryland Pub. Service Commission* (1958) 217 Md 101, 24 PUR 3d 295, 141 A 2d 699; *City of St. Francis* v. *Public Service Commission,* 270 Wis. 91, 760 A 2d 221.

Petitioner cites several distinguishable state Court decisions from jurisdictions other than Illinois in support of its argument that utility plant, regardless of its source, should be included in rate base. Among them, *New*

Rochelle Water Co. v. *Maltbie*, 289 NYS 388 (1936) is a case involving the treatment of refundable customer deposits and advances, not contributions in aid of construction. It is interesting to note that since the decision in the *New Rochelle Water* case, the New York Commission has continued to hold that contributions in aid of construction should be deducted when determining rate base. See: *Citizens' Committee* v. *Kings County Lighting Co.*, Case No. 6938, Feb. 17, 1937; *Re Western New York Water Co.*, Case No. 8233, May 19, 1937.

Similarly, the cases of *Peoples Natural Gas Co.* v. *Pennsylvania Public Utility Commission*, 34 A 2d 375 (1943) and *Arizona Corporation Commission* v. *Arizona Water Co.*, 335 P 2d 412 (1959) are far removed from the factual situation in the present case. In the *Arizona Corporation Commission* case, the Arizona Supreme Court reversed a Commission holding that for rate making purposes the fair value of utility property was equal to the purchase price paid. In *Peoples Natural Gas Co.*, the court rejected the theory that a utility should not earn a return on property which it had purchased out of its depreciation reserves since these funds were generated by past rates paid by the utility's customers.

Petitioner makes the further contention that the present holding of the Illinois Supreme Court represents an unprecedented break with prior Illinois law. This contention is based on the erroneous premise that the court ignored its previous decisions regarding fair value rate base. The court's opinion speaks for itself in response. Clearly, the court based its decision on the very cases which Petitioner suggests it ignored, finding no inconsistency with its prior pronouncements relative to fair value. Neither can any inconsistency be found between

any prior Illinois decisions and this Court's holding in the *Hope* case (infra).

Finally, Petitioner sees authority in this Court's decisions in the cases of *Smyth* v. *Ames*, 169 U.S. 466 (1898) and *Bluefield Waterworks and Improvement Company* v. *Public Service Commission*, 262 U.S. 679 (1923). The instant case is in compliance with the rules in both decisions. The Commission's Order on Rehearing expressly provides that original cost, reconstruction cost new, depreciation and working capital requirements were taken into consideration and were in fact determinative elements in calculating the Fair Value Rate Base. Petitioner is unable to cite any controlling authority holding that the particular formula used in the instant case for weighing the various factors considered, is as a matter of law, violative of the Fourteenth Amendment. In any event, the doctrine of *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) that the reasonableness of the end result is the only question for review, is clearly controlling. See: *City of Hagerstown* v. *Public Service Commission* (supra) and *Pichotta* v. *City of Skagway*, 76 PUR NS 10, 78 F. Supp. 999 (1948).

Petitioner has made no showing that the rate increase authorized in the instant case was so deficient as to be confiscatory and violative of the Fourteenth Amendment. Thus, the authorities cited by the Petitioner, when applied to the facts in the instant case, fail to support the prayer of its Petition.

CONCLUSION

It is therefore respectfully submitted that when viewed in light of all of the facts as established by the record and properly interpreted authorities, the instant Petition fails to establish any basis for this Court's issuance of a writ of certiorari to the Illinois Supreme Court.

Respectfully submitted,

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